BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY CITY OF KELSO TO GENE T. STRADER AND DAVID E. SWEET	)	
RICHARD S. HOWELL,	)	SHB No. 229
Appellant,	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
v	)	
CITY OF KELSO, GENE T. STRADER and DAVID E. SWEET,	)	
Respondents.	)	

This matter, the request for review of the granting of a substantial development permit by the City of Kelso to Gene T. Strader and David E. Sweet was brought before the Shorelines Hearings Board, Art Brown, Chairman, W. A. Gissberg, Chris Smith, Robert F. Hintz, Robert E. Beaty, and William A. Johnson, on September 14, 1976, in Kelso, Washington.

Appellant appeared pro se; respondent-permittee, a partnership,

appeared through Gene T. Strader, a partner; respondent City of Kelso appeared by and through its attorney, C. LeRoy Borders. Hearing Examiner David Akana presided.

Having heard the evidence, having examined the exhibits, and having considered the contentions of the parties, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

A shoreline management substantial development permit was issued to respondent-permittee by the City of Kelso on February 3, 1976. The total proposal is for the construction in three phases of 110 units of multi-family housing on 11.9 acres of pasture land situated adjacent to Cordouroy Slough, a branch of the Coweeman River in Kelso. The site is an old landfill. Respondent-permittee does not seek authority to construct its apartment buildings within the shoreline area. However, the earth material that is graded from a knoll outside the shoreline area would be placed in a low area adjacent to Cordouroy Slough which is within the shoreline area. The cost of the proposed development is about 2.3 million dollars. The substantial development permit authorizes only a filling of the area within the shoreline. The planned second and third phases of construction are for 50 and 60 residential units, respectively, and will be located outside of the shoreline area. The permit application does not further describe the size and location of any proposed structure excepting for a statement that the maximum height of the

apartment buildings will not exceed 24 feet.[1] Since the buildings are planned outside of the shoreline area, no shoreline permit is necessary therefor. The proposed development was viewed as a major action by the City.

II

In June, 1975, the City annexed the subject property from Cowlitz County.

The substantial development permit application for this project was filed with the City on December 12, 1975. The SEPA Guidelines (chapter 197-10 WAC) went into effect on January 16, 1976. The City made its SEPA considerations prior to the existence of any local SEPA Guidelines (WAC 197-10-800).

III

An "environmental assessment" accompanied the permit application at all times herein. The "assessment" and environmental factors were considered by the Planning Commission. The Planning Commission recommended approval of the proposed project at its January 14, 1976 meeting. Appellant was not notified of this meeting although he had requested such. He did not attend any Planning Commission meeting.

The matter was then brought before the City Council on February 3, 1976. Appellant had notice of this hearing and voiced his objections to the project. The Planning Commission's report was orally related to

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1. If buildings are intended to be placed within the shoreline area, the permit does not describe the proposed use in sufficient detail. See Hayes v. Yount, 87 Wn.2d 280, 295 (1976). In any event, the permit has been vacated based upon non-compliance with SEPA. See infra.

the Council, which report included reasons for recommending approval. The "environmental assessment" and environmental factors were actually considered by the City Council. After such consideration, the City Council voted to grant the permit. On February 13, 1976, the City drafted and filed a document purporting to be a declaration of non-significance. Appellant appeals from the City's action granting the permit.

IV

The proposed project is on the eastern edge of the City of Kelso and is bounded on the north by Allen Street. This road, fronting the project and extending 100 feet west of the proposed development, is maintained by Cowlitz County. From that point west, the road is maintained by the City of Kelso. The road is 21 to 22 feet in width with narrow shoulders and handles two-way traffic. Like many of the roads in the County, Allen Street evolved from a trail to its present blacktop construction. The surface of the road as described by the Assistant County Engineer is "average," not "high grade," and shows no signs of distress. The road is heavily and regularly traveled by passenger cars and dump trucks. The road is subject to periodic flooding at a frequency of about once every three to five years. During periods of flooding, water, up to 12 inches in depth, covers the surface of the road for about 500 feet. When flooding occurs, traffic is diverted to another road. Because of narrow shoulders, the road can be hazardous to pedestrians and bicycle traffic.

A new 260 unit mobile home park is presently under construction to the west of the proposed development, between the project and the

central business district of Kelso. The proposed development would exacerbate the existing traffic problem by adding more cars to a heavily-used road.

V

Two areas will be filled using a total of 40,000 cubic yards of earth fill. On the southern boundary of the property, a five foot deep two-acre "lake" which exists six to eight months of the year will be filled. On the western boundary, the proposed fill would border Cordouroy Slough and cover wetlands. Problems of erosion from the fill were recognized in the "environmental assessment" but no provision for control of erosion is otherwise evident in the consideration of the proposed development and on the face of the permit.

VI

In this case, the proposed development would transform a natural pasture and unpopulated area into a multi-family housing development with a projected population of 24 people per acre. There would be 110 apartment units on nearly 12 acres with underground utilities, including sewer, water, electricity, telephone, and TV. The proposed development will completely change the use of the existing area. The proposed fill may create runoff and soil erosion problems thereby affecting the water quality of Cordouroy Slough.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Shorelines Hearings Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of this proceeding.

II

Appellant attacks the validity of the permit by urging violations of the State Environmental Policy Act (chapter 43.21C RCW) (hereinafter "SEPA").[2] He does not challenge the permit based on any inconsistency with any provision of the Shoreline Management Act (chapter 90.58 RCW).

Since the substantial development permit application was filed (December 12, 1975) before the effective date (January 16, 1976) of the SEPA Guidelines, we look to the case law interpreting SEPA and not the Guidelines to decide the SEPA issues raised in this case. See Hull v. Hunt, 53 Wn.2d 125 (1958). Maloney et al. v. City of Seattle, SHB 190 (1976).

III

The preparation of an "environmental assessment" by the permittee is not prohibited. What is prohibited is the abdication of the agency's responsibility under SEPA. Fisher Co. v. King County, SHB No. 183. We find no such abdication here.[3]

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2. WAC 461-08-175 requires this Board to determine the consistency of the permit with SEPA, as well as the requirements of the Shoreline Management Act of 1971.

3. Though not applicable in the instant case, the SEPA Guidelines allow a permit applicant to provide the information upon which a threshold determination is made. See WAC 197-10-310(1); WAC 197-10-360(1).

IV

Appellant contends that SEPA error occurred because the City's declaration of non-significance was prepared after the decision to grant the permit was made. Absent the Guidelines, there is no error in this sequence of events. Implicit in the City's action granting a permit is a finding of non-significance.[4] Leschi v. Highway Comm'n, 84 Wn.2d 271, 285 (1974).

V

Appellant's remaining SEPA contentions[5] can simply be viewed as questioning the City's determination that there was no significant environmental effect from the action. The result of a determination that an action is not a major action "significantly affecting the quality of the environment"[6] is that an EIS is not required. No party suggests that the proposed development is not a "major action." Thus, this case turns on the meaning of the word "significantly" contained in RCW 43.21C.030(c). In Swift v. Island County, 87 Wn.2d 348, 358 (1976) the court stated:

> . . . We have indicated that the word "significantly" means any action taken toward an environment which has the reasonable probability of having more than a moderate effect on the

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4. The SEPA Guidelines require documentation of the agency's determination of significance or non-significance. See WAC 197-10-340; WAC 197-10-355. The Guidelines do not affect the result of this case, however.

5. Appellant's collateral attack on the Cowlitz County Boundary Review Board action and the annexation of the subject property by the City of Kelso, and the alleged environmental effects therefrom, are not properly before us.

6. RCW 43.21C.030(c).

quality of that environment. In Norway Hill Association the court enunciated the rule at page 278:

> Consistent with this policy it would seem appropriate to state a general guideline rather than attempt a value-laden definition of "significantly." Generally, the procedural requirements of SEPA, which are merely designed to provide full environmental information, should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability.

Based on our findings, we hold that the proposed development will significantly affect, i.e., probably have more than a moderate effect on, the quality of the environment, and therefore, that an environmental impact statement should have been prepared. Norway Hill v. King County Council, 87 Wn.2d 267, 278 (1976). The Norway Hill test may very well be abandoned by us in the future when a case comes up for examination under the local or SEPA Guidelines. See WAC 197-10-360. However, the result in this instance may be the same under either the Guidelines or case law.

VI

The shoreline substantial development permit was improperly issued to Strader and Sweet and should be vacated.[7]

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Shorelines Hearings Board makes and enters this

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7. There is a possibility that the applicant may also be required to have a flood control zone permit. See chapter 86.16 RCW.

ORDER

The permit granted by the City of Kelso to Gene T. Strader and David E. Sweet on February 3, 1976 is vacated and the matter is remanded to the City for further proceedings.

DATED this 13th day of October, 1976.

SHORELINES HEARINGS BOARD

ART BROWN, Chairman

ROBERT E. BEATY, Member

ROBERT F. HINTZ, Member

W. A. GISSBERG, Member

WILLIAM A. JOHNSON, Member

CHRIS SMITH, Member